



INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statutes and regulation involved.....	2
Statement.....	5
Argument.....	7
Conclusion.....	12

CITATIONS

Statutes and Regulation:

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. IV, 901 *et seq.*:

Sec. 2.....	2
Sec. 4.....	3
Sec. 205.....	3, 10
Sec. 302.....	3, 9

The Stabilization Act of October 2, 1942, c. 578, 56 Stat. 765, 50 U. S. C. App., Supp. IV, 961 *et seq.*:

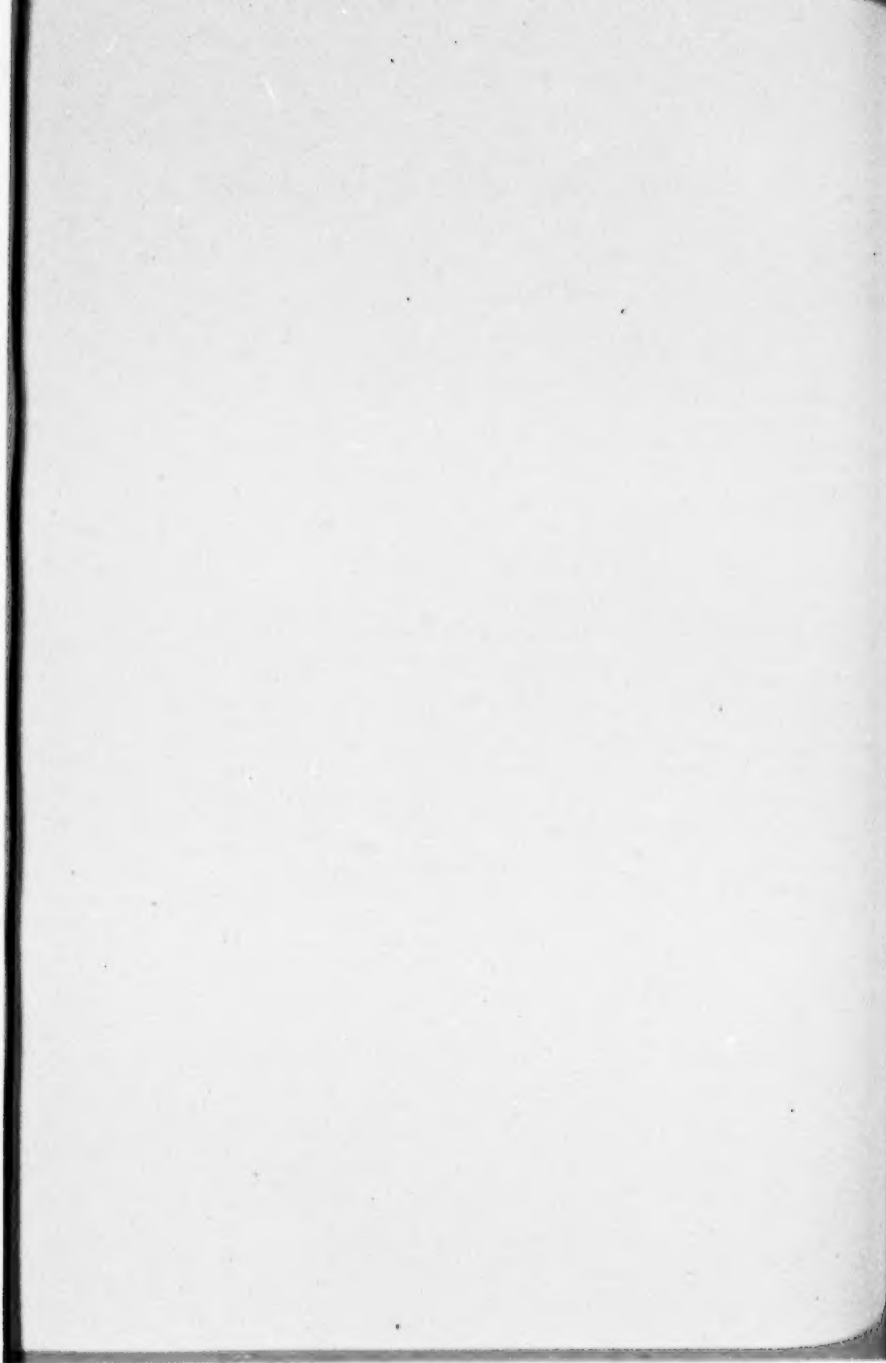
Sec. 7.....	4, 11
Sec. 11.....	4, 10

Uniform Sales Act, Sec. 1..... 9

Maximum Price Regulation No. 445, effective August 14, 1943 (8 F. R. 11161)..... 3, 10

Miscellaneous:

88 Cong. Rec., p. 7723.....	11
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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 240

SOLLY WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 148-154) has not yet been reported. The opinion of the district court denying petitioner's motion to set aside the verdict (R. 133-137) is reported at 57 F. Supp. 747.

JURISDICTION

The judgment of the circuit court of appeals was entered June 20, 1945 (R. 155). The petition for a writ of certiorari was filed July 18, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether petitioner, who agreed to supply whiskey at a price which he fixed, was a seller of the whiskey even though delivery was made by the importer directly to the buyer.

2. Whether there was sufficient proof of the ceiling price applicable to the sales made by petitioner.

3. Whether the penalties prescribed by the Emergency Price Control Act of 1942 or those prescribed by the Stabilization Act of 1942 are applicable to the crimes charged.

STATUTES AND REGULATION INVOLVED

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. IV, 901 *et seq.*, provides in pertinent part:

SEC. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. * * *

SEC. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.

SEC. 205. * * * (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

SEC. 302. (a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. * * *

Maximum Price Regulation No. 445, effective August 14, 1943 (8 F. R. 11161), provides in pertinent part as follows:

SEC. 7.8. *Compliance with this regulation*—(a) *No buying or selling above maximum prices.* On and after the effective date of this regulation, regardless of any contract, agreement or other obligation, no person to whom this regulation applies shall sell or supply, and no person in the course of trade or business shall buy or receive, any distilled spirits, wine or service at prices higher than the maximum price applicable to such sale under this regulation, and no person shall agree, offer, solicit or attempt to do any of the foregoing. However, prices lower than the maximum price may be charged or paid.

(b) *Evasion*. The maximum prices established under this regulation shall not be evaded by direct or indirect methods, whether by finder's fee, brokerage, commission, service, transportation or other charge or discount, premium or other privilege; by tying agreement or trade understanding; by any change in style or manner of packing; or in any other way.

SEC. 7.12. (b) (3) "Wholesaler" means any person (except a monopoly state or primary distributing agent) engaged in the business of buying and selling distilled spirits and/or wine without changing the form thereof, to persons other than consumers.

The Stabilization Act of October 2, 1942, c. 578, 56 Stat. 765, 50 U. S. C. App., Supp. IV, 961 *et seq.*, provides in pertinent part:

SEC. 7. (b) All provisions (including prohibitions and penalties) of the Emergency Price Control Act of 1942 which are applicable with respect to orders or regulations under such Act shall, insofar as they are not inconsistent with the provisions of this Act, be applicable in the same manner and for the same purposes with respect to regulations or orders issued by the Price Administrator in the exercise of any functions which may be delegated to him under authority of this Act.

SEC. 11. Any individual, corporation, partnership, or association willfully violat-

ing any provision of this Act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than \$1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment.

STATEMENT

An information in thirteen counts was returned against petitioner in the United States District Court for the Southern District of New York charging that, at various times in the latter part of 1943, he unlawfully offered and agreed to sell and did sell specified quantities of liquor at more than ceiling prices. Counts 1, 4, 7, 9, and 11 charged offers to sell. Counts 2, 3, 5, 6, 8, 10, 12, and 13 charged sales and deliveries of the liquor. The first ten counts were based on offers to sell and sales to one Moret; the last three on an offer to sell and sales to Waldorf Liquors, Inc. (R. 2-12.)

The evidence for the Government may be summarized as follows:

Moret, a liquor dealer from Atlanta, Georgia, testified that, while he was in New York, petitioner called upon him and asked him whether he was "interested in buying some Scotch Whiskey." Petitioner quoted the price as \$25.20 per case in bond, the billing price to be around \$11.82 and the balance to be paid in cash to petitioner. Moret agreed to buy the liquor and petitioner then told

him to send a letter to Park, Benziger & Co., an importer, ordering 500 cases. (R. 14-17; Pet. 4.) Moret sent the order and received the whiskey in two installments of 250 cases each (R. 17, 19). He paid Park, Benziger & Co. at the rate of \$11.82 per case and, at petitioner's request, sent \$6,804 in currency to petitioner's wife by air express. (R. 20-22.) Subsequently, petitioner called Moret and asked whether he could use another 500 cases. Moret agreed to take them and the transaction was handled in the same manner, except that the cash payment to petitioner was made before the liquor was delivered. (R. 22-23.) Still later petitioner told Moret that he could get 200 more cases, but that the price would be higher per case, the extra money to be in the form of a larger cash payment to petitioner (R. 24). The cash for this payment was sent to Moret's uncle in New York who, in turn, delivered it to petitioner (R. 25-28, 46-49). A further sale of 300 cases was arranged in the same manner, but only 150 cases had been delivered when Moret expressed a desire to end his dealings with petitioner. At Moret's request petitioner returned half the money paid to him on that transaction. (R. 28-30, 41-42.)

The Government also proved that petitioner offered Waldorf Liquors, Inc., 500 cases of assorted blend whiskey at \$5 above ceiling price, the extra money to be paid to petitioner in cash (R. 59, 60, 64). Only 250 cases were delivered

by International Distributors, an importer, and petitioner returned one-half of the money paid to him in cash (R. 60-61).

In submitting the case to the jury, the judge charged that petitioner was not guilty of the offenses charged if he was acting as a broker or finder; that in order to convict petitioner, they must find that he was a seller or an offerer (R. 113, 114, 115-116), but that "It is not necessary for a person who agrees to make a sale to have present possession or title of the commodity as long as he can later cause possession and title to be vested in the buyer" (R. 114).

Petitioner was found guilty as charged (R. 120). He was sentenced to six months' imprisonment on each of counts 1, 4, 7, 9, and 11, the sentences to run concurrently, and fined \$5,000 on each of counts 2, 3, 5, 6, and 12. Imposition of sentence was suspended on counts 8, 10, and 13 and petitioner was placed on probation for two years (R. 128).

ARGUMENT

1. Petitioner contends (Pet. 6, 7, 10-11, 16-19) that he was acting merely as a finder and hence that he was improperly convicted of selling liquor at prices in excess of the ceiling prices. The question whether petitioner was a finder or a seller was the one stressed by the trial judge in submitting the case to the jury, and the jury by its verdict has resolved that issue against petitioner.¹

The evidence amply supports the jury's verdict. The witnesses for the Government testified that petitioner made the initial offer to "get" whiskey for them at prices which he fixed, to be paid in a manner which he specified, and that they agreed to take it at such prices and on such terms. It is thus evident that they were not employing petitioner's services to persuade an importer to sell to them, but were agreeing to buy from petitioner. The initial agreements between petitioner and the government witnesses were therefore clearly contracts of sale. The fact that the contracts were performed by having those from whom the goods were obtained make delivery directly to the ultimate buyer instead of going through the formality of passing title through petitioner, does not serve to render the performance of the contract any less a sale. In any ordinary situation, as, for example, a contract to sell an automobile which the seller does not at the time own, there can be no question that, if the seller arranges to have the owner transfer possession and title directly to the purchaser, the former could not contend that no sale had been effected. Petitioner's acts fall squarely within the definition of "sale" given in the Uni-

¹ The subsequent amendment of Maximum Price Regulation 445 to define the status of finders, upon which petitioner relies to support his argument that his acts were not criminal at the time they were committed (Pet. 17), is not relevant, for petitioner was convicted as a seller, not a finder.

form Sales Act, Section 1, as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." But even if, in the civil law of sales, a seller must at some time acquire title to the goods, that consideration would not be controlling here. "Sale," as used in the Emergency Price Control Act, is defined in Section 302 (a), *supra*, p. 3, to include "dispositions * * * and other transfers"—a definition clearly broad enough to cover petitioner's acts.

2. During the trial, government counsel stated that he was calling Mr. Benziger to prove the ceiling price. The court inquired whether there was any controversy about it, and petitioner's counsel replied that there was none. (R. 57.) It was then conceded that the ceiling price was \$11.82 in bond (R. 58). Petitioner's counsel also conceded that the ceiling price on the International Distributor's liquor (sold to Waldorf Liquors) was \$11.82 (R. 58).

Petitioner now argues (Pet. 6, 11, 15-16) that the stipulation referred only to the established ceiling price for sales of whiskey by importers, that even if he could be found to be a seller he was not an importer, and, hence, that there was a failure of proof as to the ceiling price applicable to his sales. It is clear from the circumstances under which the ceiling price was stipulated as \$11.82 that all parties considered that figure ap-

plicable to petitioner's transactions, and, we think, properly so. Petitioner made sales under a scheme whereby they appeared to be legitimate sales by an importer, and we submit that he should be held to the ceiling price applicable to the form which he chose to give to his sales.

In any event, petitioner was clearly a wholesaler under Maximum Price Regulation 445, defining "wholesaler" as "any person * * * engaged in the business of buying and selling distilled spirits and/or wine without changing the form thereof, to persons other than consumers" (*supra*, p. 4). As such, his ceiling price was a mark-up of 1.15 percent above the importer's price to him plus the cost of transportation. (Maximum Price Regulation 445, Sections 5.3, 5.4.) Petitioner had no cost of transportation because he did not have the liquor delivered to himself. Proof of the importer's ceiling price, therefore, was sufficient to establish that petitioner's sales were far above the ceiling price, even if the wholesaler's, rather than the importer's, price be held to govern the sales charged.

3. Petitioner's remaining contention (Pet. 6, 7, 10, 11-15) is that the criminal penalties provided by Section 11 of the Stabilization Act of 1942, fixing a maximum fine of \$1,000, apply to the offenses charged in the information, rather than those in Section 205 (b) of the Emergency Price Control Act, fixing a maximum fine of \$5,000. However, as the court below pointed out (R. 153-

154), Section 7 (b) of the Stabilization Act (*supra*, p. 4) specifically provides that the penalties of the Emergency Price Control Act shall apply to violations of regulations "issued by the Price Administrator in the exercise of any functions which may be delegated to him" under the Stabilization Act. It is thus evident from the Stabilization Act itself that Congress intended to preserve the penalty provisions of Section 205 of the Emergency Price Control Act for violations of price regulations. The legislative history of the Stabilization Act makes that fact even clearer. The conference report on that statute (88 Cong. Rec. p. 7723) explains Section 7 (b) as follows:

Section 7 of the conference agreement makes applicable to any regulations or orders issued by the Price Administrator, in the exercise of any functions which may be delegated to him under the authority of this bill, the same penalties and sanctions as are already applicable to regulations or orders issued by him under the Emergency Price Control Act of 1942. These include criminal penalties, treble damages, revocation of licenses, and civil injunctions. In addition, a general penalty provision is provided by section 11 for willful violations of the act and regulations promulgated thereunder. The penalty provided by such section is a fine of not more than \$1,000, or imprisonment for not more than 1 year, or both.

CONCLUSION

The decision below is correct, the case involves no conflict of decisions, and no question of general importance is presented. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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AUGUST 1945.

End

